APPENDIX A

Legislative History of Section 20a(2).

Section 437(1) of H.R. 10453 (66th Cong.) was enacted without substantial change in 1920 as section 20a(2). The House Committee report stated, "In 1914 and again in 1916 the House passed bills containing almost the identical provisions now embodied in section 437. These provisions are familar to the House and need not be dwelt upon." H.Rep't 456, 66th Cong., 1st Sess. (1919) at p. 21. And Representative Esch, the author of the bill, asserted with reference to the securities regulation subsections of Section 437 that the House had passed "almost this identical legislation" in 1910, in 1914 and in 1916. 58 Cong. Rec. 8317-18.[1] Hence, it seems fair to say that Congress intended section 20a(2) to fulfill the same purposes to which the earlier, "almost identical," bills had been directed.

Section 13 of H.R. 17536 (61st Cong.), as that bill passed the House in 1910, sought generally to regulate the issuance of railroad securities.

The Senate voted the securities regulation section out of the bill and inserted in its stead a provision that became section 16 of the Mann-Elkins Act of 1910 and which created a commission to investigate "questions pertaining to the issuance of stocks and bonds by railroad corporations." 36 Stat. 556. This commission was officially known as the Railroad Securities Commission but was commonly called the Hadley Commission, after its chairman.

The Report of the Railroad Securities Commission, H. Doc. 256, 62d Cong. 2nd Sess., was submitted in 1911. The chairman's letter of transmittal declared that the Commission had confined itself "to the consideration of questions connected with the issuance of stocks and bonds by railroad corporations." *Id.* at p. 6. Among such questions dealt

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[1] The 1916 bill, H.R. 563 (64th Cong.), was reported to the House floor as identical to the bill the House had passed in 1914. 54 Cong. Rec. 500 (statement by Representative Rayburn). For that reason, presumably, it was not debated, nor, insofar as we can ascertain, was it passed by the House, Representative Esch's statements to the contrary notwithstanding.

with in the Report was the problem of "Control by Intercorporate Holding." *Id.* at p. 20. The Commission noted that more than 20% of outstanding railroad capital was held by railroad companies themselves, and that a large additional amount of railroad securities was owned by holding companies that controlled the policy, and directed the operations, of the carriers whose shares they held. The Commission condemned these intercorporate holdings as "a public evil," declaring that where one railroad controls the operations of another by owning a majority of its stock or where a holding company controls the operation of several roads in the same manner, "all the disadvantages of consolidation" are realized "without getting all of its advantages." *Id.* at pp. 20-21. "[C]entralization of financial power" is achieved, but not the "economy of operation which should go with it." The Commission also branded as "specific evils" resulting from control through intercorporate shareholdings the preference apt to be given to the interests of the intercorporate system as a whole as against the separate interests of each constituent carrier, and the fact that united control but separate organization invited the concealment of financial transactions. *Id.* at 21. The Commission urged as a solution to this problem that Congress require disclosure of securities transactions among carriers and affiliated holding companies, but concluded that any more stringent regulation should be avoided. *Id.* at pp. 28-29.

It stands to reason that Congress' next real effort in this area, H.R. 16586 (63d Cong.), would not, and it did not, ignore the evils of control by intercorporate shareholding revealed by the Hadley Commission. Thus, Representative Stevens observed that H.R. 16586 accomplished the "results which the Hadley Commission stated as desirable." 51 Cong. Rec. 9802. And Representative Esch coupled President Taft's recommendations (a) that railroads be forbidden directly or indirectly from acquiring "any interests of any kind in capital stock" of a competing carrier and (b) that no railroad be permitted to issue stock or bonds at less than par or fair value as evidence that the Republican Party favored the pending bill. 51 Cong. Rec. 9791. Representa-

tive Eagle stated that H.R. 16586 was "one of the three bills making up" the Democratic Party's "antitrust program." 51 Cong. Rec. 9813. The other two were the bills that became the Federal Trade Commission and Clayton Acts. Representative Barkley observed that among the purposes of H.R. 16586 was to require the Commission "to ascertain whether the proposed issue is for a purpose permitted under the law for they [sic] could not authorize a carrier to involve itself in any indebtedness which the laws would not permit it to incur." 51 Cong. Rec. 9827. He did not suggest that the antitrust laws were excepted from the "laws" under which the validity of a securities issuance was to be judged.

H. R. 16586 listed a number of appropriate purposes for a securities issuance, including "[E]xtensions and improvements" of the issuer's lines. 51 Cong. Rec. 9827. The Senate Committee on Interstate Commerce went somewhat further. It recommended amendment of H.R. 16586 to permit a carrier, with Commission approval, to issue securities for the "lawful acquisition of the property of or interest in another common carrier corporation." S. Rep't 706, 63d Cong., 2d Sess. (1914) at pp. 4-5. Plainly, the Commission would have to determine the lawfulness of the acquisition and deny approval if the acquisition violated the antitrust laws. For the Senate version also contained a provision prohibiting, *inter alia,* any rail carrier from acquiring at any time securities of a corporation owning, controlling or operating another railroad, unless the Commission found that the acquisition would not impair the ability of either carrier to perform its service to the public. *Id.* at p. 6.

We submit that the origins and history of section 20a reviewed above indicate that when Congress enacted that provision upon the understanding that it was "almost identical" to the three earlier bills going back to 1910, Congress meant to require the Commission to examine the impact of a proposed securities issuance upon competition and to determine the lawfulness of the transaction under section 7 of the Clayton Act and section 5 of the Interstate Commerce Act.

APPENDIX B—The Alleghany Case

In this Appendix, we summarize the *Alleghany* litigation as it bears upon appellees' view that the Supreme Court's second *Alleghany* decision was based upon a holding that the question of the legality of Alleghany's control of the New York Central was irrelevant to the Commission's decision to approve a securities issue by Alleghany. Our contrary view, as stated in the text of this reply brief, is that the Supreme Court's one sentence *per curiam* was based simply on the ground that the issue of control was not open under the Court's mandate in the first *Alleghany* decision.

The genesis of the *Alleghany* litigation was a controversy between Alleghany and a group that held stock in both Alleghany and the New York Central. Alleghany had ousted the old New York Central management in a proxy fight, and evidently the complaining stockholders were of the view that those in control of Alleghany were mishandling both its affairs and the affairs of the New York Central.

Among the battery of complaints filed against Alleghany in the Commission, see *Louisville & J. B. & R. Co. Merger*, 290 I.C.C. 725, 729-730 (1955), the one that finally ended in the Supreme Court centered upon the efforts of the dissident stockholders to subject Alleghany to the presumably more stringent supervision of the SEC in place of the ICC. Alleghany was an investment company, and hence would normally have been regulated by the SEC; but in a prior proceeding relating to Alleghany's control of the Chesapeake & Ohio, the ICC had exercised its authority under section 5(3) of the Commerce Act to rule that Alleghany was to be "considered as a carrier" for purposes of a number of regulatory provisions of the Act, including the provisions such as section 20 dealing with securities. See *Chesapeake & O. Ry. Co. Purchase*, 261 I.C.C. 239, 262 (1945). This ruling afforded Alleghany an exemption from regulation by the SEC. When Alleghany disposed of its Chesapeake & Ohio holdings, its opponents, with the support of the SEC, attempted in the *Alleghany* litigation to have SEC jurisdiction reinstated.

The vehicle chosen by Alleghany's opponents to press their attack was a challenge to two orders of the Commission. The first was a "status order" in which the Commission determined that Alleghany was to be "considered as a carrier" despite its sale of Chesapeake & Ohio stock. That determination was made in the context of a section 5(2) proceeding instituted by Alleghany and the New York Central seeking, *inter alia,* ICC approval of the merger of one subsidiary of the New York Central into another. In the second order, the ICC exercised its jurisdiction over Alleghany arising from the status order and approved under section 20a(2) a securities issue by Alleghany. While the two orders were not related, the securities order was, as the Supreme Court ultimately held, necessary to give the plaintiffs standing to attack the "status order," since until the Commission exercised its jurisdiction over Alleghany in some fashion having a material impact upon the plaintiffs they would have no basis to challenge the ICC's jurisdictional determination. 353 U.S., at 159-160. Thus, the three-judge court action was grounded upon both orders. Up to the first decision by the Supreme Court, however, the attention of the courts was focused primarily upon the status determination, not upon the securities question.

As to the status determination, the statutory question was whether Alleghany, a non-carrier, had acquired control of two or more carriers within the meaning of section 5(2)(a)(i). If so, the Commission had the right under section 5(3) to rule that it should be regulated as a carrier. The Commission held that Alleghany controlled the New York Central, and also that the result of the merger of the New York Central subsidiaries approved by the Commission in the section 5(2) proceeding would be that Alleghany would acquire control over a second carrier, *i.e.,* over the merged subsidiary. Therefore, the Commission concluded it had authority under section 5(3) to assume jurisdiction over Alleghany, and accordingly it approved the merger of the subsidiaries. *Louisville & J.B. & R. Co. Merger,* 295 I.C.C. 11 (1955).[1] Two days later, in the exercise of its

[1] The prior report by Division 4 is reported at 290 I.C.C. 725.

jurisdiction over Alleghany, the Commission approved the section 20(a) securities application in an unreported order. See 353 U.S., at 158.

The District Court set aside both orders, holding that the merger of the subsidiaries simply rearranged the corporate structure of companies already under common control, and that such a rearrangement could not result in a new acquisition of control. *Breswick & Co.* v. *United States,* 138 F. Supp. 123 (S.D.N.Y. 1955).[2] Therefore, whatever might be said about Alleghany's control of the New York Central, the Commission's determination that Alleghany had acquired control of a second carrier—the merged subsidiary —was erroneous; the status order in consequence was without effect; and the Commission lacked jurisdiction to approve the securities issue.

By way of alternative holdings set forth in an Appendix, *id.*, at p. 136, the court also discussed the matter of Alleghany's control of the New York Central. It was of the view that the Commission's findings that Alleghany had acquired effective control were inadequate. Moreover, the court believed that, even if Alleghany did control the Central, that relationship could not be considered as part of the basis for a section 5(3) status determination because Alleghany had not, but should have, secured Commission approval of its purchases of Central stock. The Commission had held in this connection that approval was unnecessary because a non-carrier may acquire control of a single carrier without Commission approval and because the New York Central System should be treated as a single carrier for these purposes. 295 I.C.C., at 17. The court, however, believed that the System had to be regarded as a multitude of separate carriers, and hence that Commission approval was required.

This Court reversed the District Court. *Alleghany Corp.* v. *Breswick & Co.,* 353 U.S. 151. First, it agreed with the Commission that the change in corporate relationship resulting from the merger resulted in Alleghany's acquiring

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[2] A prior opinion on a hearing respecting a preliminary injunction is reported at 134 F.Supp. 132.

control of the merged subsidiary within the meaning of section 5. Second, it upheld the Commission's finding that Alleghany had acquired control of the Central. And third, it found it unnecessary, for purposes of testing the status order, to decide whether approval of the acquisition of the Central should have been secured, because the statute did not in terms forbid the Commission from entering a status order where the non-carrier's control of carriers was illegal and because it would not be good policy to oust the Commission of regulatory jurisdiction because the non-carrier had failed to abide by the law.

The important consideration for present purposes is that nowhere in this Court's opinion—or for that matter in any opinion in the District Court or in the Commission—was there any discussion of the scope of section 20a(2). More particularly, the Court said not a word about whether the legality of Alleghany's control of the Central might be relevant to the securities application under section 20a(2) except as it bore upon the Commission's jurisdiction. This is quite understandable, since, as the briefs in this Court disclose, no party advanced any argument along those lines. Rather, the issue of control was discussed only in terms of its relevance, or irrelevance, to the jurisdiction of the Commission to regulate Alleghany.

The appellees did, however, make two arguments in this Court respecting the securities issue, and it is in the light of those arguments that the otherwise rather cryptic remarks by this Court relied upon by REA and the Government become clear. First appellees argued that they were entitled to a hearing under section 20a(2). To this, the Court replied that section 20a(6) provides that "The Commission may hold hearings, if it sees fit. . . ." *Id.*, at 175. And the lower court on remand said that "the Commission has almost free discretion as to how it may best proceed with its investigation." 156 F. Supp., at 230. But it is perfectly clear that this procedural issue is unrelated to the substantive issue as to the considerations that should be dealt with under section 20a(2).

Appellee's second section 20a(2) contention was that the securities issue was fiscally unsound. After a lengthy discussion of the matter, appellees concluded:

> "If, on the other hand, this Court upholds the jurisdiction . . : the District Court will have to consider the preferred stockholder plan, approved by the I.C.C.'s Section 20a order, on the merits. It will thus either concur or disagree with the S.E.C.'s findings that the plan is 'grossly unfair' to the common stock and 'potentially deceptive' to investors and offends against the 'public interest.' Whether it will first remand the plan to the I.C.C. for an evidentiary hearing or review it on the present record will also have to be determined. Any final order it makes will of course be subject to appeal to this Court" (Brief, p. 129).

Since this was the only section 20a(2) argument made by appellees, apart from the procedural question noted above, it is clear that this is the contention the Court referred to in what is for present purposes the key, penultimate sentence of the opinion:

> "For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of *appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act.*" 353 U.S., at 175. (Emphasis added.)

On remand, however, the District Court went beyond the terms of this mandate. *Breswick & Co.* v. *United States*, 156 F. Supp. 227 (1957). While it rejected the section 20a(2) claim made in the Supreme Court respecting the fiscal soundness of the securities issue—the only claim the Supreme Court had authorized it to consider—it again reversed the Commission on the ground that Alleghany was illegally in control of the New York Central. The court reasoned that, while the Supreme Court had held that the legality of control of the Central was irrelevant to the ques-

tion of the *jurisdiction* of the Commission, it had not held that this consideration was irrelevant to the *merits* of the Commission's determination under section 20a(2) that the securities issue should be approved.

The court was correct in its view that the Supreme Court's holding respecting Alleghany's control of the New York Central related only to the Commission's jurisdiction, not to the merits of the Commission's section 20a(2) order. However, the court erred in deciding the merits of the 20a(2) order on the basis of the illegality of Alleghany's control of the Central, because, as we have indicated, appellees had not made such a claim in the Supreme Court and the Court's mandate limited further proceedings to the claim respecting the fiscal soundness of the securities issue. Hence, on appeal the Supreme Court reversed summarily, simply repeating what it had said before as to the scope of the remand. *Alleghany Corp.* v. *Breswick & Co.*, 355 U.S. 415.

In short, this Court did not, in this final one sentence *per curiam*, construe section 20a(2) at all; it merely applied the rule that, since the appellees had not raised an issue in the previous Supreme Court litigation, it was not open on remand. One may perhaps speculate that the Court's view of the propriety of applying that rule was strengthened by a feeling that the District Court was attempting to circumvent this Court's reversal of its former judgment.